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No. 84-29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NYSA-ILA VACATION AND HOLIDAY FUND
and NYSA-ILA GAI FUND,

Petitioners,

against

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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THE WATERFRONT COMMISSION OF NEW YORK HARBOR,

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BRIEF FOR RESPONDENT IN OPPOSITION

Statement

This is an action by petitioner Funds (the NYSA-ILA Vacation and Holiday Fund and NYSA-ILA GAI Fund) for a declaratory judgment that the payments by the Funds of vacation and holiday pay and guaranteed annual income payments (hereinafter collectively "payments") to longshoremen are not subject to assessment by the Waterfront Commission of New York Harbor, the respondent herein, pursuant to the assessment provisions of the Waterfront Commission Compact (N.Y. McK. Unconsol. Laws 9858; N.J.S.A. 32: 23-58) upon the ground that such assessments are preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C., §1001, *et seq.* (1976).

In April 1978, certain employers of longshoremen in the Port of New York district instituted an action against the Waterfront Commission for a declaratory judgment that the payments by the Funds were not "gross payroll payments" paid by the "employers" of longshoremen for

"work or labor performed" within the meaning of the assessment provisions of the Waterfront Commission Compact and were therefore not subject to assessment by the Commission (pet., App. A, p. 5a). The employers' complaint against the Commission sought a judgment declaring that the Commission's assessments on the payments not only were unauthorized but also were unconstitutional upon the ground of federal preemption (p. 6a).

The Commission answered the complaint and counterclaimed against the New York Shipping Association ("NYSA") and the Funds for a declaratory judgment that the payments were assessable by the Commission and that the NYSA and Funds were "employers" liable to the Commission for the assessments (*Ibid.*).

In January 1979 (after the above proceedings in the state action), the Funds instituted this action in federal court (*Ibid.*). Paragraphs 22-25 of the complaint herein refer to the pendency of the state action and such proceedings therein.

At a pre-trial conference herein, it was agreed between the parties that this action should be placed upon the suspense calendar pending the outcome of the state action (*Ibid.*).

The state action was ultimately decided in the Commission's favor by the New York Court of Appeals. *American Sugar Refining Co. of New York v. Waterfront Commission*, 55 N.Y.2d 11, 447 N.Y.S.2d 685 (1982). The Court of Appeals held that the payments are assessable by the Commission and that the Funds (as well as the direct employers themselves) are "employers" liable to the Commission for the payment of such assessments. The Court of Appeals further held that the assessment provisions of the Compact were not preempted by the federal labor law or the Internal Revenue Code (447 N.Y.S.2d, at pp. 693-694). The Court of Appeals pointed out, in this connection, that the Waterfront Commission Compact had been approved by Congress and that therefore " 'even the

most subtle casuistry could not conjure up a claim of preemption' ", quoting from *DeVeau v. Braisted*, 363 U.S. 144, 153 (1960).

The Funds and NYSA then appealed to this Court upon the asserted federal constitutional grounds of due process and federal preemption. Their Jurisdictional Statement (Docket No. 81-2062) specifically argued that the Commission's assessment of the payments was preempted by ERISA (pp. 9-10, 13-15). The Commission moved to dismiss the appeal upon the grounds (1) that the Waterfront Commission Compact is not a state statute within the meaning of 28 U.S.C. §1257(2) pursuant to which the Funds and the NYSA were purportedly appealing (pp. 2-3 of Commissioner's Motion to Dismiss); (2) that the Funds and the NYSA never challenged in the state courts the constitutional validity of the assessment provisions of the Compact as applied (pp. 3-6) and (3) that the federal preemption and due process constitutional claims were, in any event, unsubstantial (*Ibid.*).

On June 28, 1982, this Court entered an Order providing: "The appeal is dismissed for want of a substantial federal question." (102 S. Ct. 3474). Thereafter, the Funds removed this case from the suspense calendar and cross-motions for summary judgment were made in the District Court, which granted summary judgment in favor of the Commission and dismissed the complaint (pet., App. B, 14a *et seq.*) and the Court of Appeals affirmed (pet., App. A., 1a *et seq.*).

Reasons for Denying the Writ

I.

Petitioner Funds' claim of federal preemption based upon ERISA is untenable in view of Congressional approval of the Compact after specific discussion of the assessment provisions of the Compact.

The Waterfront Commission Compact is an interstate compact between the states of New York and New Jersey duly approved by Congress (Act of August 12, 1953, 67

Stat. 54, c.407). See *DeVeau v. Braisted, supra,* 363 U.S., at pp. 147-151.

The conclusive answer to the Funds' claim of federal preemption is that Congress has consented to the Compact (including its provisions relating to assessments). For example, in sustaining the constitutionality of Section 8 of the Waterfront Commission Act, which prohibits the collection of dues for waterfront unions having criminals as officers or employees and which has the legal status of an independent state statute since it is not part of the Compact, this Court in *DeVeau v. Braisted, supra,* relied upon the fact that Congress was mindful that Section 8 is part of the Waterfront Commission Act (which includes the Compact as Part I). The Court concluded from this that Congress in approving the Compact had demonstrated its intent, even though Section 8 is not formally part of the Compact, that Section 8 should stand despite the provision of National Labor Relations Act granting employees the right to bargain collectively through representatives of their own choice. In *DeVeau,* this Court, as noted, said, "Had §8 been written into the Compact, even the most subtle casuistry could not conjure up a claim of preemption" (362 U.S., at p. 153).

See also *International Longshoremen's Association v. Waterfront Commission of New York Harbor,* 495 F. Supp. 1101, 1124 (S.D.N.Y. 1980), *aff'd in part and reversed in part,* 642 F.2d 666 (2d Cir. 1961), *cert denied,* 454 U.S. 966 (1981), wherein it was specifically held, among other things, that Section 8 of the Waterfront Commission Act is not preempted by ERISA.

Since the assessment provisions are part of the Compact itself, "even the most subtle casuistry could not conjure up a claim of preemption." Indeed, in the state case, the New York Court of Appeals in its opinion referred to specific Congressional discussion, during the consent process, of the assessment provisions of the Compact. *American Sugar Refining Co. of New York v. Waterfront Commission, supra,* 55 N.Y.2d, at pp. 691-692.

It cannot reasonably be contended that ERISA repeals the Act of Congress consenting to the Compact. On the contrary, ERISA specifically provides that nothing therein "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States" (29 U.S.C., §1144(d)).

A long line of decisions by this Court establishes that Congressional approval of an interstate compact transforms it into federal law. E.g., *Cuyler v. Adams*, 449 U.S. 433, 438, n. 7 (1981); *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419 (1940); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959) ("The construction of a compact sanctioned by Congress under art. I, §10, cl. 3, of the Constitution presents a federal question."). The Funds' argument to the contrary in this case is without substance.

II.

In dismissing petitioners' prior appeal for want of a substantial question, this Court held that the Funds' claim of preemption based upon ERISA is unsubstantial.

A.

As noted, on June 28, 1982, this Court dismissed the appeal of the Funds and the NYSA from the decision of the New York Court of Appeals in *American Sugar Refining Co. of New York v. Waterfront Commission, supra.* As also noted, the order of the Court provided: "The appeal is dismissed for want of a substantial federal question."

The Jurisdictional Statement of the Funds and the NYSA specifically argued that the Commission's assessments of the payments were preempted by ERISA, as follows:

> "Congress has seen the need for a national response. It has expressly encouraged the private

sector to resolve through collective bargaining the problems spawned by technology. [case citations] . . . It has shown particular solicitude for employee fringe benefit programs as the favored instrument of worker protection . . . Recently, Congress adopted ERISA, a comprehensive regime for the regulation of employee benefits. 29 U.S.C. §1001, *et seq.* (1976). In this pervasive statute, Congress made clear its intent to confine employee benefits exclusively to the federal domain 'superced[ing] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.' 29 U.S.C. §1144(a) (1976); see *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981)." [The *Alessi* case involved ERISA] [pp. 9-10; footnotes omitted].

* * *

"The Court of Appeals of New York excused its expansive reading of WCA §9858 by the expedient device of labeling the imposition of a licensing assessment or fee (App. A at 11a, 15a-16a). The court, however, failed to explain how this 'fee' could be levied upon employee benefit trust funds not required to be licensed under the WCA. It simply changed the statutory language, which explicitly limited the levy to employers, so as to permit the imposition upon the funds as 'payors of the benefits.' (App. A at 22a). In so doing, it disregarded the teachings of both Congress and this Court that employee benefit trust funds are entirely separate and distinct from the contributing employers. ERISA §§ 403(a), 403(c)(1) and 404(a), 29 U.S.C. §§ 1103(a), 1103(c)(1) and 1104(a) (1976); *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981)." [The *Amax Coal* case also involved ERISA] [pp. 14-15; footnotes omitted]

This Court thus ruled, in dismissing the appeal of the Funds and the NYSA, that the asserted constitutional

claims, including the claim of federal preemption based upon ERISA, were unsubstantial. That decision is, of course, controlling here. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (votes of Justices to affirm summarily and to dismiss for want of a substantial federal question are votes on the merits and district court was not free to ignore dismissal of appeal by Supreme Court upon ground federal question was unsubstantial).

B.

The Funds make the convoluted argument that, in dismissing the appeal of the Funds and the NYSA from the decision of the New York State Court of Appeals in *American Sugar Refining Co. of New York v. Waterfront Commission, supra*, for want of a substantial federal question instead of upon the ground that the Waterfront Commission Compact is not a state statute within the meaning of 28 U.S.C. § 1257(2), this Court thereby held that the Compact is a state—not a federal—statute. This tortured argument is untenable.

The question whether the Compact is a state statute within the meaning of 28 U.S.C. § 1257(2) is completely independent of the question whether the Compact is a state or federal statute for the purpose of determining whether ERISA preempts the Compact. In other words, even upon the unreasonable assumption that this court, in dismissing the Funds' appeal, held that the Compact is a state statute within the meaning of 28 U.S.C. § 1257(2), it does not follow that the Compact is a state statute for the purpose of determining whether ERISA preempts the Compact. *Lake Country Estates Co., Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398-400 (1979) (conduct of regional planning agency constituted conduct "under color of state law" within the meaning of Civil Rights Acts of 1871 notwithstanding Congressional approval of interstate compact creating agency).

Moreover, the Funds' arguments respecting the meaning, in respect of 28 U.S.C. §1257(2), of this Court's dismissal

of the Funds' prior appeal is strained to the breaking point. This Court has heretofore held that construction of an interstate compact approved by Congress involves a "federal title, right, privilege or immunity" within the meaning of former Section 344 of Title 28 (now 28 U.S.C. §1257(3)) vesting this Court with jurisdiction to review state judgments by writ of certiorari. *Delaware River Joint Toll Bridge Comm'n v. Colburn, supra.* It follows from such decision by this Court respecting 28 U.S.C. 1257(3) that an interstate Compact approved by Congress is not a state statute within the meaning of 28 U.S.C. 1257(2).

As the Court of Appeals pointed out below (pet., App. A, p. 13a):

> "Although the Supreme Court's dismissal of the appeal 'for want of a substantial federal question' might, as the Funds argue, be construed as an assumption that the Compact is a state rather than a federal law, we believe that the Court really meant that the issue presented, regardless of the basis of its jurisdiction, was not sufficiently important to warrant review. In our view, the appellants read too much into the Court's failure to treat the appeal as improvidently taken and to convert it into a petition for a writ of certiorari before acting. Accepting the Funds' argument would require considerable speculation by this court to conclude that the Supreme Court intended *sub silentio* and by summary disposition to overrule a well-established rule most recently reaffirmed in *Cuyler* [namely, that Congressional consent operates to 'transform interstate compacts into federal law.' *Cuyler v. Adams*, 449 U.S. 433, 438, n. 7 (1981).] We find such a conclusion unjustified."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Dated: New York, New York
August 6, 1984

Respectfully submitted

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